IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGEMENT NO. 406 OF 2003

IN

SUMMARY SUIT NO. 987 OF 2003

Ajaykumar Tiwari .. Plaintiff

versus

Badriprasad R. Pandey .. Defendant

...

Mr.J.J. Shukla i/b G.H. Shukla for the plaintiff.

Mr.Udaipuri for the defendant.

CORAM : D.G. KARNIK,J.

DATED : 14th March 2005.

P.C.:

1. Heard the learned counsel for the parties.

2. The plaintiff has field this suit for recovery of the principal sum of Rs.6,00,000/- given to the defendant and interest thereon. The defence of the defendant is twofold. It is firstly contended that a

loan of only Rs.3,00,000/- was given and not of Rs.6,00,000/-. Secondly, it is contended that a loan of Rs.3,00,000/- is repaid and therefore, no money is due. It would therefore be necessary to consider whether any of the two defences are prima facie probably and/or defences of any substance.

Regarding amount of loan.

3. By an advocates notice dated 9th May 2005, the plaintiff stated that he had advanced a loan of Rs.6,00,000/- to the defendant who issued four cheques totally amounting to Rs.3 lakhs towards the part payment. However, the cheques were dishonoured. Notice of demand was replied by the defendant on 17th June 2002. In paragraph no.2, the defendant stated as follows:-

> "As our clients accepted your client's offer your clients have granted him loan of Rs.6,00,000/- (Rupees Six lac only) for which our clients has given your client an English Mortgage of his House which was worth approximately Rs.6,00,000/- at the time of mortgage."

4. In the second reply to the notice dated 16th April 2003, the defendant for the first time

contended that he had received the loan of Rs.3,00,000/- only and that the typist had committed a tyographical error in typing, the reply admitting receipt of loan of Rs.6,00,000/-. It is worthwhile to note that in the first reply dated 17th June 2002, the amount of Rs.6,00,000/- is written both in figures as well as words as Rs.6,00,000/-. Furthermore, for nearly 10 moths, thereafter the defendant did not contend that there was any typing error. Therefore, the defence that only Rs.3,00,000/- was taken as a loan is not believable at all.

Regarding repayment of Rs.3 lakhs.

5. By filing an affidavit in reply, the defendant contends that a sum of Rs.48,000/- was repaid in cash to the brother of the plaintiff on 30th March 2003 and the balance sum of Rs.2,52,000/- was repaid in cash to the plaintiff on 5th April 2003. Firstly, it is not shown that the brother of the plaintiff had any authority to receive money on behalf of the plaintiff nor is any authority pleaded in the affidavit in reply. Secondly, if the repayments were really made on 30th March 2003 and

5th April 2003, as alleged, then defendant would have certainly mentioned of the said repayment in his reply notice dated 16th April 2003. While in the reply dated 16th April 2003, the defendant contended that there was a typographical error in admitting that the loan was of Rs.6,00,000/- instead of Rs.3,00,00/-, he did not utter a word regarding the alleged repayment which is alleged to have been made about 10 to 15 days prior to the reply. In these circumstances, the defence about the repayment is also not at all believable.

6. However, since the defendant has produced on record xerox copies of the receipts of the alleged payments of Rs.3,00,000/- out of which a sum of Rs.2,52,000/- has been alleged to have been paid to the plaintiff himself, it would be appropriate to grant a conditional leave to the defendant to defend the suit.

7. Taking an overall view of the matter and also taking into consideration that the defendant had also issued cheques worth Rs.3,00,000/- to the plaintiff in the year 2001-2002 and also taking into consideration that under section 80 of the Negotiable

Instruments Act, the plaintiff would be entitled to interest on the said cheques at 18% p.a. and the amount of interest on Rs.3,00,000/- for a period of 2 1/2 years would come to about Rs.1,50,000/- making a total liability of the defendant to be Rs.4,50,000/- inclusive of interest, I pass the following order:-

8. The defendant is granted conditional leave to defend the suit subject to his depositing in the Court a sum of Rs.3,00,000/- within a period of four weeks. On such deposit, the suit shall stand transferred to the list of commercial causes. The amount if deposited would be invested in the State Bank of India or nationalised bank of the choice of the defendant, if such choice is indicated at the time of the deposit initially for a period of 13 months to be renewed from time to time till the disposal of the suit.

9. The defendant to file written statement within a period of one month.

D.G. KARNIK,J